

DISTRIBUTED
FEB 17 78

ORIGINAL COPY

No. 77-5742

RECEIVED

FEB 17 1978

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

dc

KENNETH RAY FRAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-5742

KENNETH RAY FRAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We have concluded after review of this case that petitioner's federal prosecution for interstate transportation of stolen property, after he had been convicted by the State of Kentucky for theft of the same property, was not authorized by the Attorney General, as required by Department of Justice policy, and that it would therefore be appropriate to vacate petitioner's conviction.

1. Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on two counts of interstate transportation of stolen goods having a value of \$5,000 or more, in violation of 18 U.S.C. 2314. He was sentenced to consecutive terms of five years' imprisonment. The court of appeals affirmed (Pet. App.; 563 F. 2d 803).

- 1 -

- 2 -

The evidence at trial showed that petitioner purchased two tractors by passing worthless checks in the amounts of \$16,500 and \$18,000 (Tr. 29, 33, 35, 45, 46, 64-69, 76).^{1/} Petitioner transported both tractors across state lines (Tr. 55, 56, 89). Only one tractor was ever recovered (Tr. 53).

Prior to his federal conviction, petitioner was convicted in Kentucky state court of stealing the two tractors, in violation of Ky. Rev. Stat. Ann. 514.040.^{2/} He was sentenced to consecutive terms of one year and two years' imprisonment. The Kentucky Court of Appeals affirmed. Frakes v. Commonwealth, No. CA-758-MR, decided September 2, 1977.^{3/}

2. As explained in our recent Memorandum in Rinaldi v. United States, No. 76-6194, decided November 11, 1977, shortly after the decisions in Abbate v. United States, 359 U.S. 187, and Bartkus v. Illinois, 359 U.S. 121, the Department of Justice adopted a formal policy of declining to prosecute individuals for acts forming the basis of a state conviction "unless the reasons [were] compelling," and then only after the specific approval of the Attorney General had been obtained. See Petite v. United States, 361 U.S. 529, 531.

^{1/} The \$16,500 check, dated September 15, 1975, was drawn on a nonexistent account (Tr. 46). The \$18,000 check, dated September 22, 1975, was drawn on an account that contained insufficient funds (Tr. 76).

^{2/} Petitioner was sentenced on the state charges on October 7, 1976. His federal trial began on October 13, 1976.

^{3/} We have been informed by the Kentucky Attorney General's office that the Supreme Court of Kentucky granted discretionary review of petitioner's state conviction on February 13, 1978.

The Attorney General did not approve this dual prosecution. After thorough consideration of the pertinent facts, we have determined that petitioner's prosecution for interstate transportation of stolen property is not supported by a compelling federal interest, in light of the substantial relationship between that charge and the offense of which petitioner was convicted in state court and the sentence imposed upon petitioner on the state charges. We therefore respectfully request the Court to permit the effectuation of the government's policy against successive state and federal prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment. See Rinaldi v. United States, *supra*; Croucher v. United States, 429 U.S. 1034; Watts v. United States, 422 U.S. 1032; Ackerson v. United States, 419 U.S. 1099.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

FEBRUARY 1978.